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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 403

ALVIN B. SAWYER, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Alvin B. Sawyer, your petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cases on August 19, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not as of this date reported in the official or unofficial reports. The opinion of the United States Court of Appeals for the Fourth Circuit is hereto appended.

JURISDICTION

The judgments of the Court of Appeals affirming the judgments of the District Court were entered on August 19, 1961. Upon application of the petitioner, and for good cause shown, the Court of Appeals on August 30, 1961, ordered that its mandates be stayed pending application of the petitioner in the Supreme Court of the United States for a writ of certiorari to the Court of Appeals. The jurisdiction of this Court is invoked under the provisions of 28 USCA, Section 1254(1).

QUESTIONS PRESENTED

Case No. 8265 in the Court below.

1. Should the petitioner's motions for judgment of acquittal made both at the conclusion of the government's evidence and at the conclusion of all the evidence have been allowed?

2. Did the Court commit prejudicial error in permitting the government to offer evidence over the objection of the petitioner that the officers later on the day of the particular investigation, to wit, August 14, 1959, discovered an illicit distillery and related materials approximately 500 yards from the petitioner's house and lot?

3. Did the Court commit prejudicial error in permitting the government to offer evidence over the objection of the petitioner that Officer Gaskill within twelve months preceding the arrest of the petitioner, assisted in the destruction of two distilleries in "this area", one of said distilleries being at least 1000 yards from the petitioner's premises?

Cases Nos. 8264 and 8263 in the Court below.

4. Did the Court commit prejudicial error in that following the conviction and sentence in Case No. 8265 in the Court below, upon motion of the probation officer, petitioner's probation was revoked and he was ordered to serve the sentence imposed in earlier cases, said orders of revocation being predicated as a matter of law upon said conviction in case No. 8265 below?

STATUTE INVOLVED

"It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5.000, or imprisoned not more than 1 year, or both." Title 26, USCA, Chapter 51, Section 5686(a).

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Case No. 8265 in the Court below came on for trial in the Washington Division in the Eastern District of North Carolina, on October 31, 1960, before Honorable Algernon L. Butler, District Judge, and a jury. The bill of indictment charged petitioner, Alvin B. Sawyer, et al, with unlawfully possessing property intended for use in violating the provisions of the Internal Revenue Code pertaining to distilled spirits, in that petitioner allegedly possessed 1260 pounds of sugar and nine 5-gallon jugs in violation of Title 26, United States Code, Section 5686(a).

As the close of the government's evidence and at the close of all of the evidence, petitioner, through counsel,

moved for judgment of acquittal. Both motions were denied.

At the close of all the evidence and the charge of the Court, the jury returned a verdict of guilty as to petitioner and other co-defendants. Thereupon, W. T. Woodard, Jr., Chief United States Probation Officer, for the United States District Court, Eastern District of North Carolina, moved the Court in Case Nos. 8263 and 8264 below for the revocation of petitioner's probation. In these two cases, petitioner had earlier been convicted of violation of the Internal Revenue Laws relating to the manufacture of non-tax paid whiskey, and had been sentenced and placed on probation. Following the conviction and sentence in case No. 8265 below, upon motion of said Probation Officer, petitioner's probation was revoked and he was ordered to serve the sentences imposed in said earlier cases. The orders of revocation of probation in the earlier cases were predicated as a matter of law upon the conviction in Case No. 8265 below.

In summary, the evidence is as follows:

That shortly after midnight on August 14, 1959, B. V. Halstead, an ABC Officer of Pasquotank County, together with A. D. Baum, an ABC Officer of Pasquotank County, and Jack Gaskill, an Investigator for the Alcohol and Tax Unit of the United States Treasury Department, went near the premises of the petitioner about eight miles north on Highway No. 17 from Elizabeth City, North Carolina and maintained a surveillance of the premises; that Officer Halstead about 2:30 A.M., observed an automobile coming south down the highway and the lights went off on said automobile; that said automobile continued down the highway and turned into the petitioner's yard, whereupon

one of the occupants of the vehicle opened the garage doors and another occupant drove said vehicle into the garage and the doors were then closed; that Officers Halstead and Baum went to the garage under cover of darkness; that said Officers observed the two occupants of the vehicle unloading a quantity of sugar and jugs therefrom; that the two occupants of said vehicle were William Edward Griffin and Willie Swain, co-defendants in this action; that after observing this activity for a few minutes Officers Halstead and Baum entered the garage; that the garage is a separate building from the petitioner's dwelling house, located in the vicinity of 40 feet from it; that after some period of time elapsed Officers Halstead and Baum went to the petitioner's dwelling house and knocked on the outside doors; that the petitioner came to the front door with his bedroom slippers and trousers on and stated to the officers that their knocking and calling to him had aroused him from sleep; that the officers stated to the petitioner they wanted to talk to him about the sugar in the garage; that he, petitioner, didn't know anything about it. Petitioner went out to the car and asked the two boys what they meant by bringing it to his garage. They said, "We thought it was the place to bring it to but I reckon we were wrong"; that the officers found a green boat tied up at a canal near the petitioner's property, and wheelbarrow tracks or a path leading to a garden adjacent to the canal and near where the green boat was tied up; that over objections of petitioner, the Government offered evidence that an illicit distillery was found as much as 400 yards down the canal from the petitioner's property, off of the petitioner's property and 75 feet or more from the side of the canal opposite the side on which petitioner's house and lot were located; that altogether the illicit liquor

distillery was located as much as 500 yards from petitioner's property; that the co-defendants, Griffin and Swain, denied to the Officers that they knew petitioner or that they had ever seen him before; the petitioner denied to the Officers that he had any knowledge of the materials and denied any knowledge or connection or ownership of the illicit distillery.

On cross examination Officer Halstead testified that co-defendants Swain and Griffin said they must have got to the wrong place; that Swain said it was the wrong place; and Griffin said it sure was the wrong place; that there was a filling station known as the Hudson Filling Station located on the same side of the highway as the petitioner's residence about 150 yards north of the Sawyer residence; that there was a boat dock to the rear of the Hudson Filling Station, with boats in the dock, and a ramp for launching boats; that the illicit distillery site was accessible from this boat dock, and it was about the same distance from the boat dock to the distillery site as from the petitioner's residence to the distillery site; that a path led by the Hudson Filling Station from the highway to the boat dock; that the boat dock provided access to the canal; that there were other means of access to the distillery site than across the petitioner's lot, that one could go to the distillery site from the boat dock at the Hudson Filling Station, from the highway at the point where the canal intersects the highway, and by crossing the Pasquotank River which lies considerably to the eastward of the petitioner's lot; that the Pasquotank River is narrow—from 60 to 100 feet—at the point where the canal intersects the Pasquotank River; that the Officers had a search warrant when they went on the petitioner's lot, but there is no evidence that they found any materials on the premises other than what they ob-

served the co-defendants Griffin and Swain unload from the vehicle driven on the lot by them; that the Officers never at any time saw the petitioner at the distillery site, and the only place they saw him was at the door of his home after they had aroused him from sleep and when he accompanied them to the garage.

ABC Officer Baum testified for the Government in substance, that he accompanied Officer Halstead on the night of this investigation; that he knocked on the door of the petitioner's residence, called to him and he came to the door dressed in his pants and bedroom shoes; that the petitioner appeared to have just gotten out of the bed; the petitioner stated that he had just awakened; that petitioner denied knowing anything about the materials which the co-defendants had placed in the garage; that the co-defendants, Griffin and Swain, denied that they knew petitioner; that the co-defendants stated that they had brought the materials to the wrong place; that the distillery site was accessible from the boat dock and canal at the Hudson Filling Station; that the distillery site is accessible from the Pasquotank River, the Pasquotank River at the point where the canal leads into it being only 50 to 100 feet in width; that the petitioner denied any connection with or ownership of the distillery; that the petitioner stated that he did not know anything about the distillery, and no charge was against him in that connection.

ATU Officer, Jack Gaskill, testified for the Government that he accompanied the other Officers on this investigation; that he heard the petitioner ask the two co-defendants what they were doing in his garage with sugar; that co-defendant Swain replied that he had been instructed by a man who hired him to bring the

sugar from Virginia to carry it to a place in North Carolina, and he thought he was to the right place but he had gotten to the wrong place; that later that day Officer Gaskill went to the distillery site, not on petitioner's lot, but about 500 yards from petitioner's lot; that at the entrance to the still path something had rubbed against a tree that had left the appearance of green paint on it; that there were boats in the boat dock behind the Hudson Filling Station, and Officer Gaskill did not know whether or not at various times there were green boats in the boat dock; over objection of petitioner Officer Gaskill testified that in the 12 month period prior to the date of this particular investigation he had assisted in the destruction of a distillery twice the distance from the petitioner's lot as the one discovered on the day of the investigation; Officer Gaskill diagrammed for the Court and jury the neighborhood under consideration and pointed out at least four residences in the immediate area, including the residence connected with the Hudson Filling Station, besides the residence of petitioner; that the distillery site discovered on the day of the particular investigation was partially behind the Hudson Filling Station in terms of direction; that the distillery site was accessible from the canal at the highway, from the boat dock behind the Hudson Filling Station and from the Pasquotank River; that automobiles and trucks could drive to the boat dock at the Hudson Filling Station; that Officer Gaskill did not know how many boats were in the boat dock at the Hudson Filling Station at different times; that Officer Gaskill went to the distillery site without crossing the petitioner's lot; that the distillery site found near the Pasquotank River within a year prior to this investigation was about a half mile from the petitioner's lot and property; that

the distillery site found on the day of the investigation was about a quarter of a mile from the highway and the petitioner's property; that there was a little path leading over from the petitioner's garage to a garden back of the petitioner's property.

G. M. Hudson, owner and operator of the Hudson Filling Station, testified for the petitioner that he had been operating the filling station about ten years; that he closed his place of business usually around eight o'clock at night; that the boat dock had been behind the filling station approximately four years; that many people had used the boat dock for the purpose of going down the canal, both with and without his permission; that boats could navigate the canal from the highway on to the Pasquotank River; that various and sundry people used the canal for fishing and hunting purposes; that after the closing of his business at night the boat dock and canal could be used without his knowing it; that a roadway leads from the highway by the filling station to the boat dock; that he had seen people using the boat dock after he had closed his business; that he had seen them using it mornings before he got up; that some of them were strangers from Virginia; that he sleeps on the opposite end of the house from the roadway leading to the boat dock.

Co-defendant, Willie Swain, testified in his own behalf that he is employed by the Government in Norfolk, Virginia; that shortly before August 14, 1959, a man by the name of "Pete" employed him to drive a car on this particular trip; that "Pete" instructed him that a vehicle would drive ahead of him on Highway 158; that at a certain time and place the leading vehicle would turn around and flash three light signals toward co-defendant Swain at which time co-defendant Swain would turn into a path to his right; that the

leading car disappeared on the night in question, did not in fact give any light signals to co-defendant Swain, and if in fact such signals had been given the path that co-defendant Swain would have been signalled to turn into under the instructions would not have been on the same side of the highway as petitioner's premises; that as co-defendant Swain was travelling along on the journey he became frightened by lights which seemed to be following him at some distance; that he cut the lights off on the vehicle he was operating and drove over on the Hudson Filling Station lot; that he then continued along the highway in search of a place to unload the materials in the vehicle and make a getaway; that upon seeing the Sawyer garage he decided to unload the vehicle and then find his way back home; that he did not know the petitioner, had no instructions to take materials there, but simply left the materials there when he became frightened by lights that appeared to be following him.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner was indicted for alleged violation of Federal Statute 26 United States Code, Chapter 51, Section 5686(a), hereinbefore cited and quoted.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) There is no direct evidence to connect petitioner with the commission of the alleged crime. The evidence offered is circumstantial, conjectural, and speculative. All that is shown may be true, and petitioner be innocent of the crime charged. In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that

of guilt. Evidence which merely creates a suspicion of guilt is not enough. The crucial question in this case is whether the circumstantial evidence offered is such that logical and legitimate inferences may be drawn therefrom to support the factual conclusion that the petitioner was a party to the alleged crime. It is submitted that the correct answer is "no". However strong the suspicion may be, it seems that supposition and conjecture must be invoked to reach such factual conclusion. *Scott* v. *United States*, (Tenth Circuit) 145 F. 2d 405, at page 408; *Kassin* v. *United States* (5 Cir.) 87 F. 2d at page 184; *Cochran* v. *United States* (8 Cir.) 41 F. 2d 193, 206; *Cartello* v. *United States* (8 Cir.) 93 F. 2d 412, 414; *United States* v. *Russo*, (3 Cir.) 123 F. 2d 420, 423. *Spalitto* v. *United States* (8 Cir.) 39 F. 2d 782; *Sutton* v. *United States*, (5 Cir.) 131 F. 2d 108.

(2) The Court committed reversible error in allowing the Government to introduce evidence over objection of the petitioner of the discovery by Government agents on the date of petitioner's arrest of an illicit distillery located approximately 500 yards from his residence. It is submitted that the evidence is insufficient to show conscious possession on the part of the petitioner. Consequently, such evidence was not competent to show any intent on the part of the petitioner.

(3) The Court committed reversible error in allowing the Government to introduce evidence over the objection of the petitioner of the destruction of two illicit distilleries by Government agents in "this area" within the twelve months preceding the arrest, one of which distilleries was located at a distance of approximately 1000 yards from petitioner's premises, and there being no evidence as to the distance the other distillery was

located from petitioner's premises. The opinion of the Court of Appeals indicated that it has some doubt regarding the competency of this evidence. The following statement appears in that opinion: "If it was error to admit such evidence as too remotely related in time and place to the charge contained in the indictment, the error was harmless and will be disregarded." Evidence of a vague and uncertain character, offered to show that the accused might be guilty of a similar offense, should not be admitted under any pretense whatever, nor is mere suspicion, or proof of a suspicious circumstance, sufficient. Before guilty intent may be inferred from some other similar crime, such similar crime must be established by evidence which is legal, competent, plain, clear and conclusive. 22 CJS, Criminal Law, Section 690, page 1112. Evidence of another distinct offense not connected with the crime charged is not admissible in a prosecution for the violation of a liquor law. 22 CJS, Criminal Law, Section 691, page 1145. *Echikovitz* v. *U. S.*, CCA Wis. 25 F. 2d 864. Evidence which has no tendency to establish the guilt or innocence of the accused and which if effective at all, could serve only to prejudice or mislead, or excite the minds and inflame the passions of the jury should not be admitted. 22 CJS, Criminal law, Section 600, page 922. In a prosecution for possession of sugar and other property for alleged use in violation of Title 26, USCA, Section 5686(a), the Court committed prejudicial error in admitting evidence of defendant's alleged reputation for violating liquor laws and evidence of conviction for conspiracy to violate Internal Revenue Statutes eight years earlier. *Benton* v. *U. S.*, CA NC 1956, 233 F. 2d 491. How can it be said or known that this incompetent evidence was harmless to petitioner. For all that appears, this in-

competent evidence might very well have been the decisive factor in the minds of the jurors.

(4) If the conviction in Case No. 8265 below is not sustained, either for lack of evidence or for incompetent evidence, then, in such event, the Court's orders of revocation of probation in cases Nos. 8264 and 8263 below should be vacated. It is true that Courts have certain discretion with reference to probation. However, the Court in this instance did not exercise discretion, but instead predicated its decision to revoke probation as a matter of law on the conviction in Case No. 8265 below. Consequently, it necessarily follows that if there is error in Case No. 8265 below then the orders of revocation of probation in Nos. 8264 and 8263 below are error.

CONCLUSION

This petitioner should not be required to serve a prison sentence on the evidence appearing on this record, or, if it should be determined that the evidence is sufficient than he is entitled to a new trial because of the admission of prejudicial and incompetent evidence. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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